(3)

No. 91-625

In the Supreme Court of the United States

OCTOBER TERM, 1991

E-V Company, a Partnership Composed of Emil F. Kehr and Vincent E. Malone, and Keller Office Equipment Company,

Petitioners

v.

Urban Redevelopment Authority of Pittsburgh,

Respondent.

Brief in Opposition To Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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STATEMENT OF THE CASE

Petitioners seek review of a decision of the Supreme Court of Pennsylvania which sustained an acquisition of property by condemnation by the Respondent, the Urban Redevelopment Authority of Pittsburgh ("URA").

In Pennsylvania, a condemnation is effected by virtue of a condemnor filing a Declaration of Taking in the Court of Common Pleas and serving same on the condemnee. 26 P.S. § 1-402(a) A condemnee desiring to challenge the taking may file Preliminary Objections thereto within thirty (30) days after being served. 26 P.S. § 1-406(a) Evidence relating to disputed questions of fact may be developed in a hearing before the Court or in depositions. 26 P.S. § 1-406(e) In the case at bar, the Court ordered the use of depositions. In addition, a condemnee may utilize all of the discovery processes and tools incident to general litigation such as depositions, interrogatories, request for production of documents, examination of an adversary's records and requests for admissions.

In Pennsylvania, a redevelopment project can be proposed if prior thereto the municipal Planning Commission has certified that a particular area has become blighted and is in need of redevelopment. Thereafter, a redevelopment authority may propose a redevelopment project pursuant to the Urban Redevelopment Law of Pennsylvania, 35 P.S. § 1701, et seq ("URL"), which proposal will include the acquisition of properties required to effectuate the redevelopment project. The proposal by the authority must be approved by the governing body of the municipality. In the case of the City of Pittsburgh, the governing body is the City Council.

On October 9, 1981, the Respondent filed a Declaration of Taking condemning the property of Petitioner. The Petitioners contend that the taking was unconstitutional because it occurred so long after the certification of blight on October 4, 1971 that it was not feasible to challenge effectively the certification; however, a cursory review of the evidence and the pretrial

and trial proceedings prove that contention to be totally without merit, and in no event can it rise to the level of a constitutional argument.

The Petitioners state that the persons who participated in the blight study process were not available for them to cross-examine and confront. This is simply not so. The URA produced for deposition Mr. William Waddell, who personally directed and carried out the blight study and made the recommendation of blight to the Planning Commission. The URA also produced Jan Krygowski, Planning Director of the URA during the certification study process and during the period of initial implementation of the Proposal. Mr. Krygowski was the person who personally supervised the URA's activities during such periods and personally identified the important exhibits evidencing such participation. The Condemnees did not seek discovery from a single, solitary person who was not made available to them. They took no steps whatsoever to determine whether any of the many persons who worked on the study process were available for deposition, answering of interrogatories or for appearance during the depositions for trial stage. Therefore, they are now estopped to assert any constitutional arguments. They really do not know whether any person familiar with the blight study process was truly unavailable.

The URL sets forth the procedures and steps to be followed in a redevelopment project. The last step is that City Council holds a public hearing on the proposal at which hearing any interested person or entity is entitled to be heard. Such hearing was held on April 12, 1972. City Council must approve or reject the proposal, which approval includes authorizing URA to effectuate required condemnations. It is most important that Petitioners do not allege that public notice of the hearing before City Council was not duly given.

Petitioners' property is located within 90.8 acres which were certified as blighted by the City Planning Commission on October 4, 1971. A point of information is in order regarding a certification by the Commission on December 18, 1964 of 203

acres which also contained Petitioners' property. The 1964 certification is irrelevant as the area certified as blighted in 1971 stands on its own and is the one at issue in this case.

SUMMARY OF THE ARGUMENT

This case involves a condemnation of Petitioners' property for redevelopment purposes, based upon a prior certification by the local Planning Commission that the area in which the property was located was blighted and in need of redevelopment. Pennsylvania condemnation procedure permits a condemnee to challenge the blight certification by filing Preliminary Objections to the taking at the time it occurs. Further, the Supreme Court of Pennsylvania held that a blight finding may be challenged in an action in equity upon approval of a redevelopment project by the City Council. The Pennsylvania process is not unique, and the decision of the Supreme Court of Pennsylvania is not in conflict with any decision of this Court, any decision of a State court of last resort or decision of any United States Court of Appeals. There is not at issue here any question of great public importance. Rather, there is at best only questions traditionally and appropriately left to State legislatures.

Petitioners' contention that an excessive amount of time elapsed between the time of the certification of blight and the taking of their property is not correct. There is not a constitutional issue present herein. Petitioners had eleven months in which to conduct pretrial discovery and six months in which to conduct depositions for trial. Despite the availability of such time periods, Petitioners have not set forth the name of any person they wished to depose or from whom they otherwise wished to obtain evidence. Accordingly, they should not now be heard to complain, especially on constitutional grounds, when no evidence of lack of necessary witnesses exists.

Petitioners' contention, that the time span involved prejudiced them to the extent of a constitutional infringement, is not warranted as a general proposition of law. The time period involved here is approximately ten years. Many causes of action in Pennsylvania are governed by statues of limitations

which could result in trials ten or more years after the event at issue. Such time period does not deprive a party of the constitutional right to a fair trial.

A certification of blight is not a taking of a person's property, but rather is a legislative finding that certain conditions exist in an area. Such finding may never be acted upon and no property may ever be taken; therefore, constitutionally, a property owner within the area is not entitled to a trial based upon such certification alone.

ARGUMENT IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI

I. This case does not involve any question of exceptional public importance.

Certiorari should be granted only in cases involving principles, settlements of which are of importance to the public as distinguished from the parties, and in cases where there is a real conflict of opinion and authority between Courts of Appeals. *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).

Rule 10.1, Rules of this Court, relating to "Considerations Governing Review on Writ of Certiorari" provide that certiorari "will be granted only when there are special and important reasons therefor". In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955), this Court said on page 616 (S.Ct.) as follows:

> "Special and important reasons imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance become evasion."

The Petitioners do not assert, as indeed they cannot, that the decision of the Supreme Court of Pennsylvania is in conflict with any decision of this Court, any decision of a State Court of last resort or a decision of any United States Court of Appeals. Petitioners do not assert that the process in Pennsylvania for

effectuation of redevelopment projects is unique. There are not present here the "special and important reasons" referred to in *Rice, supra.* There are, at best, only arguments as to whether there might be some better way to implement a redevelopment project. Such decisions should be and traditionally have been left to state legislatures.

II. Petitioners were afforded a meaningful hearing at a meaningful time and had available to them all witnesses, documents and evidence necessary for a full, fair and complete hearing.

The Petitioners had a period of eleven months in which to conduct pretrial discovery. They took one deposition and filed a Request for Production of Documents to review documents on file at the offices of URA. All files were made available to Petitioners' attorney. All of the sixteen (16) studies relating to the blight certification process were in such files and available for inspection. Therefore, Petitioners had the opportunity and time (11 months) in which to take the deposition of any person who prepared any such information or who participated at all in any aspect of the certification of blight process. They could have engaged in other forms of discovery such as interrogatories or request for production of documents relative to such information. Petitioners adduced no evidence of any nature whatsoever which would indicate that any person they wished to depose or otherwise obtain evidence from was unavailable or unwilling to provide such evidence. The depositions for trial were taken from September, 1982 to February, 1983, a period of 6 months. Petitioners could have called as witnesses numerous persons who participated in the blight studies. They did not do so and should not now be heard to complain, particularly on constitutional grounds, of a lack of available witnesses when, in fact, no evidence of such nonavailability exists.

Chief Judge Crumlish, writing for a unanimous Commonwealth Court below, summarized cogently the inadequacy of and lack of merit in Petitioners' assertions:

> "They had eleven months subsequent to the declaration of taking to obtain discovery but sought only to review the

Authority's files and to take the deposition of the Authority's engineering consultant, Kenneth Ira Britz. The Condemnees' bare assertions, without substantiation, that critical witnesses are unavailable or unable to competently testify about the 1971 certification are insufficient for us to conclude that there was an unconstitutional violation of due process.

The Condemnees' argument is further weakened by the fact that the Authority produced, and the Condemnees cross-examined, at least two witnesses who were intimately involved with the certification activities and decision-making process."

Judge Crumlish concluded as follows:

"Following our thorough review of the record testimony and evidence, we can discern no indication that the mere lapse of time has so disabled the Condemnees in proving their allegations as to rise to the level of a constitution violation."

(App. A-49)

It is obvious that Petitioners consciously chose not to attempt to determine the names of or call those persons actually involved in the certification process. The record is devoid of evidence that any such persons were not available.

The attempt by Petitioners, without offering any evidence in support thereof, to raise the time span argument into a constitutional issue is not warranted as a general proposition of law. There are many instances in which litigation is properly commenced many years after the event which is the subject thereof. By way of example, many causes of action in Pennsylvania are covered by a six year statute of limitations. 42 Pa.C.S.A. § 5527. Such period is not substantially different from the time span of which Petitioners here complain. It would not be unusual for a case commenced six years after the subject event to be tried nine, ten or more years after the occurrence. In such cases, it is possible that witnesses might move away, die or otherwise not be available. That does not render a six year

statute of limitations unconstitutional. Here, there is no evidence that all relevant witnesses were not available to testify.

Whatever may be the merits of a time span argument, they are not relevant here because Petitioners have not set forth the name of a single person whom they attempted to obtain as a witness who was not available.

Therefore, there can be no conclusion but that the alleged substantial constitutional issues advanced by Condemnees are merely a smokescreen utilized to hide the actual facts of this case: the actual facts being the overwhelming weight of the blight studies, data gathering process and good faith efforts of individuals such as William Waddell and Jan Krygowski which resulted in a meaningful and valid certification of the project area as blighted.

Petitioners' assertion that the URA abandoned the project is not supported by the record and is contrary to the findings of fact of the trial judge. Redevelopment of the area was a continuing process which commenced in 1971 and continued unabated through and past the date of condemnation on October 9, 1981.

Subsequent to City Council approval of the Redevelopment Proposal on March 5, 1972 the URA acted promptly to carry out the Proposal. There was a constant stream of redevelopment activities from such date through and past October 9, 1981, the date of condemnation. As the testimony indicates, such activities never abated, but moved forward constantly through the years.

On the above point, Judge Louik in his trial court Adjudication below said that "moreover the time span for the redevelopment project was set at forty (40) years. Abandonment or staleness cannot be shown here, as the plan will be in effect through 2012". (App. A-71) Judge Louik also found as facts the many redevelopment activities engaged in by the URA subsequent to approval of the Redevelopment Proposal by City Council. (App. A-61-62)

The cases cited by Petitioners in support of their "meaningful time" argument are simply not relevant here. *Armstrong v.*

Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) involved a failure to give notice to a natural father that his wife's second husband had petitioned to adopt the father's daughter. It was in *Armstrong* that this Court used the term "meaningful hearing at a meaningful time" upon which Petitioners rely herein. The right of a parent to continue his/her parental rights is so fundamental as to require no further discussion.

The other cases cited by Petitioners relate to basic property rights, i.e., suspension of driver's license, garnishment, wrongful termination, a prior determination without a hearing that a person could not purchase liquor, so that each case involves an immediate deprivation of rights then vested and existent in specific individuals. The above deprivations contrast sharply with the facts and law in the case at bar.

A certification of blight is not a deprivation of the property right of an individual or even a group of individuals. Rather, it is in the nature of a legislative finding that certain conditions exist in an area. *Trager v. Peabody Redevelopment Authority,* 367 F.Supp. 1000 (1973); see also *Government of the Virgin Islands v. 19.623 Acres of Land,* 536 F.2d 566 (1966) and *Joiner v. City of Dallas,* 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974), aff'g. mem. 380 F.Supp. 754 (N.D.Tex., 1974). Simply put, that is the extent of a certification. A certification does not require that any action be taken, and an area may be certified as blighted and nothing ever done pursuant thereto.

Alternatively, an area may be certified with a part being redeveloped and the balance remaining untouched. Under these circumstances, it is both practical and logical to await an actual condemnation before challenging a certification. Consider the possible alternative if blight were challenged at the time of Planning Commission consideration. A property owner could challenge the certification, the parties litigate the same, exhaust their appellate remedies, and after years of litigation learn that there is still no redevelopment project which might result in a taking of property.

It is also important here that Pennsylvania law does provide a remedy of which Petitioners or their predecessors in title failed to avail themselves. Justice Zappala, writing for the majority in the Supreme Court of Pennsylvania, stated that the Court had held that an action in equity will lie to challenge a certification of blight. *Crawford v. Redevelopment Authority*, 418 Pa. 549, 211 A.2d 866 (1965) (App. A-12)

Finally, the Petitioners asserted in paragraph 7 of their Preliminary Objections (App. A-75) that the area was not blighted as of the date of condemnation. Petitioners abandoned such point, but despite such abandonment, URA chose to meet the issue squarely and introduced expert testimony which reviewed the blight criteria set forth in the URL and concluded that, based upon such criteria, the area remained blighted at the time of condemnation.

CONCLUSION

The Supreme Court of Pennsylvania concluded correctly that a certification of an area as blighted by a local Planning Commission does not constitute a taking of property, and that if and when a redevelopment project resulting from such certification is approved by the City Counsel, an aggrieved property owner may challenge such approval in equity at such time. Further, since a property owner may also challenge certification if and when the property is condemned, a condemnee has not been deprived of a due process hearing.

Accordingly, Petitioners' Petition for Writ of Certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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